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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-335

JOHN BYRON WOLBERG,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Petitioner's statement is accepted.

JURISDICTION

Petitioner's statement is accepted.

QUESTION PRESENTED

Petitioner's statement of the question presented is rejected, because the State of Oregon does not concede that "there are no facilities for treatment of [petitioner's] mental disease" available within the framework

of the Oregon correctional system. Respondent substitutes the following, which, except for the matter in brackets, is verbatim the Federal question presented to the Oregon Court of Appeals in petitioner's brief in that court.

> Is the sentence imposed upon defendant [committing him to the custody of the Oregon Corrections Division for a term not to exceed 10 years] cruel and unusual and not proportionate to the offense [of assault with a dangerous weapon,] in violation of Amendments VIII and XIV of the Constitution of the United States?[1]

STATUTES INVOLVED

In support of its reasons for denying the petition herein, respondent relies upon various sections of Oregon Revised Statutes (hereinafter cited as ORS) which are not set forth by petitioner. Since the constitutionality, construction, or application of these statutes is not in issue, and since they are cited merely to support the argument advanced below, they are not collected here, but are set forth in footnotes on the appropriate pages of this brief.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent supplements petitioner's statement of the case with the following additions, corrections, and exceptions thereto.

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[1] The "Question Presented" at page 2 of Appellant's Brief in the Oregon Court of Appeals reads, in full, as follows:

"Is the sentence imposed upon defendant cruel and unusual and not proportionate to the offense in violation of Article I, Section 16 of the Constitution of Oregon, and Amendments VIII and XIV of the Constitution of the United States?"

1. Respondent denies that petitioner will necessarily be confined in the Oregon State Penitentiary, which petitioner treats as a foregone conclusion. The place of confinement of persons committed to the custody of the Oregon Corrections Division is a matter to be determined by the Division, as is explained more fully in subheading B of respondent's Reasons for Denyng the Writ, below.

2. Respondent acknowledges that the psychiatrists who examined petitioner were of the opinion that the facilities at the Oregon State Penitentiary would provide inadequate treatment of petitioner's mental problems. Respondent adds, however, that the psychiatrist who stated that hospitalization followed by outpatient care was the proper course of treatment for petitioner also expressed the following opinion at petitioner's sentencing hearing.

> "* * * I think also that the service at the Oregon State Hospital for this purpose, in my opinion, would be adequate." (Tr. Sentencing 36).

3. At the time he imposed sentence herein, the trial judge stated:

> "* * * [T]his is about as serious an assault with a dangerous weapon as anyone here in the courtroom can recall where the victim is able to testify. I think if there is any hospitalization that it will be arranged by the authorities and that the Order of this Court is, that your legal and physical custody e committed to the Corrections Division without limitation of time for a term not to exceed 10 years. I will recommend and point out to the Corrections Division when I make my report that these two psychiatrists have indicated that treatment is, well, they say necessary or beneficial, or at least indicated and they can

arrange it for you and perhaps they will. The reason I said 10 years, I don't expect that you will be there that long and that also will be up to those authorities, but I think had you been here on the charge that you would have been here, had things worked out as you intended that would have been a minimum sentence.[8] That will be the Order." (Tr. Sentencing 45-46).

REASONS FOR DENYING THE WRIT

In his petition for certiorari, petitioner depicts himself as a mentally-ill person condemned under a primitive penal system to 10 years' imprisonment in the penitentiary with no hope of treatment for his mental disorder. Respondent does not deny that petitioner suffers from a mental disorder, just as petitioner does not deny that he is legally sane, and therefore responsible for his criminal conduct, under present Oregon law.[9] However, the petition herein presents a thoroughly misleading picture of Oregon sentencing and commitment procedures, and of what can be done to treat petitioner under them. Accordingly, the purpose of this brief in opposition is to correct any misimpression concerning these matters which the petition may have given, and thereby

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[8] N.B. The trial judge is apparently alluding here to the fact that, had petitioner been convicted of first degree murder, he would not have been eligible for parole until he had served at least 10 years of his sentence. It will be recalled that petitioner was originally indicted for assault with intent to kill, but ultimately pleaded guilty to the charge of assault with a dangerous weapon. See *State v. Wolberg*, 92 Or. Adv. Sh. 621, — Or. App. —, 483 P.2d 104 (1971).

[9] It may be noted in passing that, while Oregon presently follows the "M'Naghten rule" for determining legal insanity, it has adopted and after December 31, 1971, will follow a test of insanity based on the Model Penal Code, whereby "a person is not responsible for his criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." ORS 161.295(1); Oregon Laws 1971, ch. 743, § 36(1).

to demonstrate that the sentence imposed in this case is not cruel and unusual on the grounds urged by petitioner.

A. It is not conceded that the Oregon correctional system is incapable of providing treatment for petitioner's mental disorder.

Respondent categorically denies petitioner's repeated assertion that the State of Oregon has already conceded its inability to provide treatment for petitioner's mental illness. The assertion is apparently based solely on the fact that the Respondent's Brief filed by the State in the Oregon Court of Appeals began with the sentence, "Defendant's statement of the case, the question presented, and the facts are accepted," rather than quibble with petitioner's obviously argumentative framing of the legal issues presented in his brief,[6] a practice frequently followed by respondents in this state when it seems reasonable to assume that the Oregon appellate courts will not mistake argumentation for literal fact.

To "accept" petitioner's argumentative language for purposes of his appeal was, of course, to acknowledge that such language stated his position with respect to the issues presented. But it was not a stipulation in the

[6] The language which gives rise to the so-called "concession" asserted for the first time in this Court appears at page 3 of petitioner's brief in the Oregon Court of Appeals, under the heading "Statement of the Facts," and is as follows:

> "The facilities available to the State for the treatment of [petitioner's] condition are insufficient to provide him with the type of intensive care and treatment he requires (Tr 26); under the legal and physical custody of the Corrections Division, he will be reduced to medications and to subservience and there will be no treatment for his condition (Tr 37). That this is so is uncontested fact supported by the record and based upon the experience and personal observation of the expert witnesses called on behalf of defendant at his sentencing (Tr 24-29)."

courts of Oregon, nor is it a concession in this Court, that the Oregon correctional system is, in fact, incapable of providing treatment for petitioner's mental disorder. Indeed, petitioner did not attempt to argue in the state court that the State had thus stipulated to the inadequacy of its correctional system. Had he done so, he would have had the speciousness of such a contention pointed out before now, and very possibly the court itself would have saved respondent the trouble of doing so.

B. Petitioner was not necessarily sentenced either to 10 years' imprisonment or to confinement in the Oregon State Penitentiary. Rather, he is committed to the custody of the Oregon Corrections Division for an indefinite term.

Contrary to petitioner's assertions, his sentence is not necessarily one of 10 years' duration. Under Oregon law, all felony sentences are for an indeterminate period of time, with the trial court having power only to fix the maximum potential length thereof. ORS 137.120(2).[4] Nor does petitioner's sentence necessarily involve confinement in the Oregon State Penitentiary, because an Oregon trial court has no power to designate the institution in which a criminal defendant is to be confined. The court merely commits the defendant to the custody

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[4] ORS 137.120(2).

"Whenever any person is convicted of a felony, the court shall, unless it imposes other than a sentence to serve a term in the penitentiary, sentence such person to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in the judgment and sentence a maximum penitentiary term for the crime, which shall not exceed the maximum term of imprisonment provided by law therefor; and judgment shall be given accordingly. Such a sentence shall be known as an indeterminate sentence."

of the Oregon Corrections Division, which thereafter administratively determines what is to be done with the person convicted. ORS 137.124.[6]

C. The Oregon Corrections Division has the authority to commit petitioner to the Oregon State Hospital, where there are adequate facilities to treat petiioner; and the sentencing court undertook to recommend that petitioner be considered for such commitment.

The State of Oregon maintains a number of hospitals for the mentally ill, which are administered by the Oregon Mental Health Division. Among these is the Oregon State Hospital at Salem. ORS 426.010.[7] This facility is

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[6] ORS 137.124

"(1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

"(2) Upon commitment to the Corrections Division all convicted male persons under the age of 26 who have not been convicted of the crime of murder or rape where actual force is involved or treason, or who have not served a previous term of imprisonment in an adult penal institution, shall be assigned initially to the Oregon State Correctional Institution. All other convicted male felons shall be assigned initially to the Oregon State Penitentiary.

"(3) After assuming custody of the convicted male person and notwithstanding the initial assignment pursuant to subsection (2) of this section, the Corrections Division may transfer inmates from one penal or correctional institution to another such institution for the purpose of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate."

[7] ORS 426.010

"Except as otherwise ordered by the Mental Health Division pursuant to ORS 179.325, the Oregon State Hospital in Salem, Marion County, the F. H. Dammasch State Hospital authorized to be located within a 20-mile radius of the county courthouse of Multnomah County, and the Eastern Oregon Hospital and Training Center in Pendleton, Umatilla County, shall be used as state hospitals for the care and treatment of mentally ill persons who are assigned to the care of such institutions by the Mental Health Division or who have previously been committed to such institutions."

adequate for the treatment of petitioner's mental condition, in the opinion of the psychiatrist who recommended hospitalization at petitioner's sentencing (Supp. Statement, ¶ 2, at 3 above). The Oregon Corrections Division is empowered to transfer persons in its custody, with the consent of the Mental Health Division, to the Oregon State Hospital, "whenever the welfare of the person transferred and the efficient administration of the institutions require the transfer." ORS 179.010(2), 179.473(1)(a).[6] In apparent recognition of the fact that such transfer can be arranged, the trial judge undertook, at the time he sentenced petitioner, to point out to the Corrections Division that psychiatric treatment was indicated in petitioner's case (Supp. Statement, ¶ 3, at 3-4 above).

Under these circumstances, the sentence imposed in this case does not constitute cruel and unusual punishment. Petitioner's recourse in this case is not to burden this Court with unmeritorious constitutional questions,

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[6] ORS 179.010 "As used in this chapter, unless the context requires otherwise: • • •

"(2) 'Division' means the division designated by law to operate, control, maintain and supervise any institution, and includes the Mental Health Division, the Corrections Division and the Special Schools Division."

ORS 179.473

"(1) Notwithstanding any other provision of law, whenever the welfare of the person transferred and the efficient administration of the institutions require the transfer, subject to ORS 179.476:

"(a) Any division, with the consent of the Mental Health Division, may make a permanent or nonpermanent transfer of a person at any institution under its jurisdiction to an institution for the mentally ill or mentally deficient, or, with the consent of the school, to the University of Oregon Medical School, or with the consent of the Corrections Division, from an institution for the mentally ill or mentally deficient to a juvenile training school."

premised upon a distorted portrait of the Oregon correctional system. It is, rather, to petition the Oregon Corrections Division to take the administrative action necessary to cause petitioner to be committed to the appropriate mental facility, and, if the circumstances indeed warrant such action now or in the future, to apply to the State Board of Parole and Probation for parole and ultimate discharge therefrom, pursuant to ORS 144.050 and 144.310.®

® ORS 144.050

"Subject to applicable laws, the State Board of Parole and Probation may authorize any inmate, who is confined in any county jail for a period of six months or more or committed to the legal and physical custody of the Corrections Division, to go upon parole subject to being arrested and detained as provided in ORS 144.350. The state board may establish rules and regulations applicable to parole."

ORS 144.310

"When any paroled prisoner has performed the obligations of his parole for such time as satisfies the State Board of Parole and Probation that his final release is not incompatible with his welfare and that of society, the board may make a final order of discharge and issue to the paroled prisoner a certificate of discharge; but no such order of discharge shall be made in the case of a person convicted of murder in the first degree and in no other case within a period of less than one year after the date of release on parole except that when the period of the sentence imposed by the court expires at an earlier date, a final order of discharge shall be made and a certificate of discharge issued to the paroled prisoner not later than the date of expiration of the sentence."

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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